Department of Justice
Washington, D.C. 20530

APR 5 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Ash:

The Central Intelligence Agency proposes to add a new subsection, (g), to section 102 of the National Security Act of 1947, as amended, (50 U.S.C. 403), to furnish additional protection for intelligence information. The amendment would create a new criminal offense for unauthorized disclosure, and would provide for an injunction action to prevent such disclosures. The Department of Justice recommends against submission of this legislation to Congress.

Subsection (g) would contain six subdivisions on which we comment seriatim as follows:

I. The Offense.

Subdivision (1) would create an offense, punishable by imprisonment for ten years, a fine of $10,000, or both, for the communication of "information relating to intelligence sources and methods" to an unauthorized person by anyone who acquired such information by virtue of his service in the government or employment by a government contractor.

We oppose the creation of a new criminal offense basically because the subject matter is already substantially protected by existing law. In addition, as will be shown, the CIA here seeks harsher penalties against a larger class of persons at a lesser burden of proof than required by existing law.

Under present law, the Director of Central Intelligence is authorized under Executive Order 11652 to classify "national security information" as "top secret," "secret," or "confidential." He is further authorized by the implementing National Security Council Directive of May 17, 1972, 37 F.R. 10053, to mark material specially as involving "sensitive intelligence sources and methods." If this authority is properly exercised the material a fortiori would relate to the "national defense" within the meaning of current 18 U.S.C. 793, 794, except insofar as sensitive information regarding foreign relations is arguably not "national defense information". Transmission of "information relating to the national defense" to an enemy in wartime, or to a foreign power at any time, with intent to injure the United States or secure an advantage to a foreign power, is already a capital offense. 18 U.S.C. 794. Communication of such information simply to an unauthorized person by one who has been lawfully entrusted with it is a ten-year offense. 18 U.S.C. 793(d). However, under these statutes the government has to prove to a jury that the information was in fact related to the national defense, Gorin v. United States, 312 U.S. 19 (1941), a requirement often necessitating either self-defeating public disclosure, or abstention from prosecution.

The proposal seeks to avoid this heavy burden of proof and the dilemma by pivoting the offense on the fact of "classification" or "designation," rather than the actual relationship with national defense, as in present 50 U.S.C. 783(b). That statute, which provides a ten-year penalty for employees of the United States who disclose classified information of any description to either communists or foreign agents, was upheld in Scarbeck v. United States, 317 F.2d 546 (D.C. Cir. 1962), cert. denied, 347 U.S. 856 (1963). However, we observe that the CIA proposal would go far beyond the coverage of that statute by adding former employees of the United States and present and former employees of contractors with the United States as potential offenders, and would expand the forbidden class of recipients to all the world.

The proposal is apparently patterned after 42 U.S.C. 2277 which prohibits a similar class of present and former employees of the United States and its contractors from disclosing "restricted data" to unauthorized persons. But the penalty provided by that provision of the Atomic Energy Act for simple unauthorized disclosure is only a $2,500 fine without any jail sentence. The penalty rises to the ten-year and $10,000 fine level of the proposal only when the communication is made "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation." 42 U.S.C. 2274(b).

Subdivision (2) broadly defines "information relating to intelligence sources and methods" as material which, "for reasons of national security or in the interest of the foreign relations of the United States," has been so "designated pursuant to rules and regulations prescribed by the Director of Central Intelligence."

In this regard, we point out that it is true that 18 U.S.C. 798 similarly provides a ten-year penalty for anyone who "knowingly and willfully . . . communicates . . . to an unauthorized person classified information - (1) concerning . . . any code, cipher, or cryptographic system . . .; (2) apparatus . . . used . . . for cryptographic or communication intelligence purposes; (3) concerning . . . communication intelligence activities; or (4) obtained by the processes of communication intelligence," Although this provision has never been tested in court, its definitional material, like that in the Atomic Energy Act, is more specific, detailed and concrete than that in proposed subdivision (2).

Apparently as a concession to the questionable validity of eliminating the relationship of the material to national defense as a principal issue in the case and as an issue for decision by a jury, subdivision (3) would preclude punishment of a recipient as an accomplice, accessory or co-conspirator, unless he himself obtained the information by virtue of his employment by the government or a contractor. In an appropriate case, of course, he would remain subject to prosecution under other statutes. The Department does not object to this subdivision in principle, but believes it is awkwardly phrased.

Subdivision (4) tracks 18 U.S.C. 798(c) and provides that designation of the material does not preclude delivery to Congress in response to a proper demand. We have no specific objection to this subdivision.

II. In Camera Proceedings.

Subdivision (5) provides that "[i]n any proceeding" the court may review the designation "in camera" and may invalidate it if it is found "arbitrary and capricious." By "any proceeding" presumably both criminal prosecutions under subdivision (1) and injunctive proceedings under subdivision (6) are intended.

There is ample precedent that in a prosecution initiated to punish conduct violative of administrative action the court may decline to do so without a showing that the action was not arbitrary and capricious. Indeed in Estep v. United States, 327 U.S. 114 (1946), a selective service case, the Court explicitly stated that if judicial review were precluded by Congress, relief would be available after conviction by habeas corpus. Id. at 123-124. Selective service law further suggests that it is both permissible and appropriate for the propriety of the designation action to be decided by the court as a matter of law to the exclusion of the jury, to set the invalidation standard at arbitrary and capricious, and to place the burden of proving invalidity on the defendant. Cox v. United States, 332 U.S. 442, 452-453, 448-449 (1947).

But, it is not at all clear that in camera proceedings will be tolerated. Subdivision (5) does not define in camera. Even if nothing more is intended than the exclusion of the public (which is doubtful), a very serious issue is raised, United States v. Lopez, 328 F. Supp. 1077, 1087 (E.D. N.Y. 1971), which, though more easily justified than exclusion of defendant or his counsel, United States v. Bell, 464 F.2d 667, 670 (2nd Cir. 1972), may nevertheless be "an error of constitutional magnitude." United States v. Clark, 475 F.2d 240, 247 (2nd Cir. 1973); United States v. Ruiz-Estrella, 481 F.2d 723 (2nd Cir. 1973). The foregoing cases involved pretrial suppression hearings involving testimony concerning the use of anti-skyjacking profiles at which defense counsel was present. Even though such proceedings are collateral to issues of guilt or innocence, cf. McCray v. Illinois, 386 U.S. 300, 305 (1966), the Sixth Amendment right to public trial and confrontation was held to attach. Where validity of the designation is the heart of the case, exclusion of the public and of the defendant raises clear constitutional problems.

If it is intended by "in camera" to further exclude defense counsel, the provision is almost certainly invalid. In Alderman v. United States, 394 U.S. 165 (1969), of the seven justices that addressed themselves to the issue, five, of whom four are still sitting, insisted that an adversary proceeding was necessary to determine whether the four trials had been tainted by evidence from illegal electronic surveillance. Id. at 180-185, 187. Two justices, neither of whom still sits, would have allowed in camera proceedings in two companion espionage cases, United States v. Ivanov and United States v. Butenko, but only one of the latter would have allowed in camera review in national security cases not involving foreign espionage.

Id. at 197-200, 209, 211. Even they would have required a turnover of the material on pain of dismissal if the judge found it "relevant." In United States v. United States District Court, 407 U.S. 297 (1972), eight justices, without dissent, reaffirmed the turnover requirement of Alderman even though the Attorney General had certified that "it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the court in camera." Ibid. at 335 fn. 1.

It is therefore hardly conceivable that so central an issue as the validity of the designation can be determined in nonadversary proceedings. The traditional rule in criminal cases is that the government may invoke its military secret or national security privileges only at the price of letting the defendant go free. United States v. Reynolds, 345 U.S. 1, 12 (1953), citing United States v. Andolschek, 142 F.2d 503 (2nd Cir. 1944), and United States v. Beekman, 155 F.2d 580 (2nd Cir. 1946). See also Nixon v. Sirica, 487 F.2d 700, 765-766 (D.C. Cir. 1973) (Wilkey, C.J., dissenting).

It is doubtful that the government would fare better as plaintiff in the civil injunction action proposed in subdivision (6). There, too, the rule seems to be that the privilege is waived by initiating the action. Bowles v. Ackerman, 4 F.R.D. 260 (S.D. N.Y. 1945); United States ex rel. Schlueter v. Watkins, 67 F. Supp. 556, 560-561 (S.D. N.Y.), aff'd, 158 F.2d 853 (1946) (dictum); Bank Line, Ltd. v. United States, 76 F. Supp. 801, 803 (S.D. N.Y. 1948) (dictum); but cf. United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). Only as the defendant in a civil action has the government had some success in asserting its privileges without losing the case. Reynolds v. United States, supra; E.P.A. v. Mink, 410 U.S. 73, 86 n.13 (1973).

III. Injunctive Proceedings.

Subdivision (6) provides that the Attorney General may, at the instance of the Director of Central Intelligence, seek an injunction to forestall violations. This is patterned after 42 U.S.C. 2280, a statute which has never been tested.

The utility of this proposal is questionable. The government recently, without benefit of a statute, successfully sought an injunction against a former employee of the CIA preventing him from publishing a book in violation of a secrecy agreement he had executed

on commencing his employment. United States v. Marchetti, supra. The court held that such agreement did not violate Marchetti's constitutional rights to the extent that the prohibition was restricted to classified matter which had not entered the "public domain" by prior disclosure. Id. at 1317. Though one member of the panel, concurring, would have allowed the employee to prove "by clear and convincing evidence that a classification was arbitrary and capricious," id. at 1318, the majority held to the contrary, noting courts are ill equipped to review foreign intelligence matters.

Subdivision (5) of the proposal would allow review of the scope suggested by the concurring judge in Marchetti, but fails to take into consideration the constitutionally mandated "public domain" exception.

In a proper case the courts might even allow an injunction against persons not parties to secrecy agreements if there is some showing of privity or acting in concert. See Maas v. United States, 371 F.2d 348, 351 (D.C. Cir. 1966). It is doubtful that a statute could protect more information against more people than these cases. Although the multiplicity of decisions in the case of The New York Times Co. v. United States, 403 U.S. 713 (1971), makes it difficult to generalize, only Justices White and Marshall seemed concerned by the absence of a statute. The principal adverse decisions rested more on failure of the government to make a positive showing that serious injury was to be apprehended.

As violation of an injunction can no longer be summarily punished without notice and hearing, and, no more than six months' imprisonment may be imposed without jury trial, see Cheff v. Schnackenberg, 384 U.S. 373 (1966), and its progeny, subdivision (6), in a sense, merely creates a lesser offense to that prescribed in subdivision (1).

IV. Conclusion.

In the present atmosphere of detente abroad and suspicion of government secrecy at home this proposal will arouse stiff opposition. Its enactment would have only a marginally incremental

protective effect since the material it seeks to protect is substantially covered by existing statutes, and the procedural devices it would initiate are to some extent available under current law. Some of its objectives are of highly doubtful validity. The Department believes that in the long run it may be better to rely on secrecy agreements and our ability to demonstrate positive need in an appropriate case than to seek a remedy which, given the temper of the times, may well be refused and serve as a precedent against us in our time of need. Submission of the proposal to Congress is accordingly not recommended.

Sincerely,

(Signed) W. Vincent Rakestraw

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Assistant Attorney General

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